U.S. Department of Justice

Office of Intelligence Policy and Review

LIMITED OFFICIAL USE

Washington, D.C. 20530

November 1, 1982

MEMORANDUM FOR [redacted] STAT
Executive Secretary
Technology Transfer Intelligence Committee

Re: U.S. Government Authority to Obtain Information in Support of Export Control Laws

The University of California at San Diego (UCSD) recently adopted a policy of refusing to provide information to federal officials concerning the actual or proposed research activities of foreign students attending UCSD ("UCSD Memo" hereinafter). Government officials seek such information to determine if these students may or do have access to U.S. technology protected by law from export without a license. UCSD objects to these inquiries fearing they will lead to government restrictions on the research activities of foreign students, thus interfering with the university's espoused principles of "free inquiry and free exchange of information regarding research and scholarship." You have asked whether UCSD has a right to withhold information concerning foreign student programs when such information is necessary to determine whether these programs do or may involve violations of export control laws.

Conclusion

We have determined that federal officials may require UCSD to furnish information concerning its foreign students' research activities by virtue of authorities contained in the Export Administration Act, 50 U.S.C. App. §§ 2401 et seq., the Arms Export Control Act, 22 U.S.C. §§ 2751 et seq. and the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 et seq., subject to the restrictions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. The relevant provisions of each Act and its regulations are discussed in

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turn below.1/

A stronger case for compelling UCSD to provide information to federal officials can be made under the investigative provisions of the Export Administration and Arms Export Control Acts than under the Immigration and Nationality Act. The Export Acts and their implementing regulations provide enforcement officials with a specific legal basis for compelling UCSD to provide them with the information they require to administer the Acts subject, however, to the provisions of the Family

1/ This memorandum will not discuss the constitutionality of actually applying the regulations under these Acts to require a license before disclosing information to foreign students in a purely academic setting. The Office of Legal Counsel raised significant questions concerning the constitutionality of proposed revisions to the Export Administration Act regulations (15 C.F.R. Part 379, "Export regulations;" July 28, 1981 memorandum from Theodore B. Olson to Henry D. Mitman, Department of Commerce) and the existing regulations are sufficiently similar to the proposed revisions to warrant consideration of OLC's concerns. OLC opined that subjecting academic exchanges to the licensing scheme set forth in the proposed revisions to the Export regulations could amount to an unconstitutional prior restraint on protected speech in many circumstances. Similar concerns were raised in an earlier OLC memorandum analyzing proposed revisions to the Arms Export Control Act regulations (22 C.F.R. Part 125, "ITAR;" July 1, 1981 memorandum from Theodore B. Olson to William B. Robinson, Department of State). The technical data provisions of ITAR were found to be constitutional, however, in United States v. Edler Industries, 579 F.2d 516 (9th Cir. 1978), provided they were applied to information "significantly and directly" related to specific items on the munitions list. Whether or not a similar result would be reached in a challenge to the technical data provisions of the Export regulations is not clear. It is clear, however, that government application of a regulatory system intended to control the flow of information is rife with danger, particularly in an academic setting. We note that the Departments of Commerce and State have been attempting to rewrite their regulations to take into account these constitutional concerns. In any case, we consider the constitutionality of the regulations as applied to be a separate question from whether information may be required in order to determine whether they should be applied. Until regulations are found to be contrary to law, they are presumptively valid. New York Foreign Freight Forwarders & Brokers Ass'n. v. Federal Maritime Commission, 337 F.2d 289 (2 Cir. 1964), cert. den. 380 U.S. 910 (1964), and National Customs Brokers & Forwarders Ass'n. of America Inc. v. Consumer Prod. Safety Commission of U.S., 559 F.2d 774 (D.C. Cir. 1977). Since the regulations discussed herein have not been found unconstitutional, this memorandum proceeds on the assumption that the information requested from UCSD is being solicited in support of a constitutionally sound regulatory scheme.

Educational Rights and Privacy Act.2/ The latter requires federal officials to issue an administrative subpoena to obtain personally identifying information about a student who is attending a university when the information sought is other than general "directory information" disclosed pursuant to university policy. A recent court decision, post, held that the Act does not protect from disclosure information obtained from other than educational records, e.g., information known in the academic community or obtained through personal contact or conversation. This alternative may not be feasible in the case of UCSD, however, whose policy directs faculty and administrators to refer all federal inquiries to the Dean of Graduate Studies.

While the government has far-reaching authority to investigate potential violations of the export control laws, its authority under the Immigration Act is limited to placing restrictions on the particular visit or to denying visas to foreign students if information required to make the necessary determinations under the Act is not forthcoming.

Appropriate action may also be taken against student visaholders who violate INS regulations. However, neither the Act nor its regulations currently require detailed course of study information to be supplied in support of a visa application. Further, it appears that in the case of Chinese scholars, actual practice has been to facilitate their entry and, except in the most substantial cases, to leave matters such as export violations to be investigated after such students have arrived in the U.S. This approach requires observance of the restrictions in the Family Educational Rights and Privacy Act in more instances than would ordinarily be the case since the Act comes into effect once a student begins attending a university.

I.

Section 2411(a) of the Export Administration Act (as codified at 50 U.S.C. App.) provides that enforcing agencies, "to the extent necessary or appropriate to the enforcement of [the] Act,"

> may make such investigations and obtain such information from, require such reports or the keeping of such records by, make such inspection of the books, records, and other writings, premises, or property of, and take the sworn testimony of any person. (Emphasis added.)

2/ The Family Educational Rights and Privacy Act does not apply to persons who have not actually "been in attendance" at an educational institution. 20 U.S.C. § 1232g(a)(6). Thus, to the extent that government inquiries concern foreign students who have not yet begun their programs at a particular university, this Act would not bar disclosure of the requested program information.

That section further provides that enforcing officials may subpoena records and personal testimony in order to enforce the Act, and federal district courts are authorized to issue appropriate orders in support of those subpoenas. Thus, federal officials have the authority under this Act to require UCSD to provide information about the research activities of its foreign students if such information is determined to be necessary or appropriate for the enforcement of the Act.

The Export Administration Act prohibits the unlicensed export of certain kinds of technology to specific countries. It defines this controlled technology broadly so as to include the types of information that may be expected to be exchanged in an academic setting.

> The term "technology" means the information and knowhow that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data, but not the goods themselves. 50 U.S.C. App. § 2415(4). (Emphasis added.)

The Act's implementing regulations define "technical data" as

> information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. The data may take a tangible form, such as a model, prototype, blueprint, or an operating manual; or they may take an intangible form such as technical service. 15 C.F.R. § 379.1(a) (footnote omitted).

Although the Act fails to define the term "export," the regulations define an export of technical data to include, "any release of technical data in the United States with the knowledge or intent that the data will be shipped or transmitted from the United States to a foreign country." 15 C.F.R. § 379.1(b)(1)(ii) (emphasis added). Since it may be reasonably assumed that disclosure of data to a foreign student temporarily in the U.S. necessarily implies transmittal of that data to a foreign country along with the returning student, the regulations contemplate the acquisition of licenses before information that could be employed in the design or utilization of articles or materials controlled by the Act is imparted to foreign students.

The regulations support this reading by granting a general export license, for which no further application or formal issuance is required, to instruction in academic institutions

and academic laboratories3/, but not to information that involves research under contract related directly and significantly to design, production, or utilization in industrial processes. 15 C.F.R. § 379.3(a)(2).

Thus, pursuant to the Export Administration Act and its regulations, enforcing agencies may require UCSD to furnish information about the actual or proposed research activities of its foreign students in order to determine whether exchanges of technology beyond the scope of section 379.3(a)(2) are taking place and whether a specific license would be required.

II.

The Arms Export Control Act also prohibits the export of technical data without a license but restricts itself to the export of technical data related to defense articles and services included on the United States Munitions List. 22 U.S.C. § 2778(a)(1),(b)(2); 22 C.F.R. Part 125.

Technical data for purposes of the Act are defined by regulation to mean

> (a)Any unclassified information that can be used, or be adapted for use, in the design, production, manufacture, repair, overhaul, processing, engineering, development, operation, maintenance, or reconstruction of arms, ammunition, and implements of war on the U.S. Munitions List; or (b) any technology which advances the state-of-the-art or establishes a new art in an area of significant military applicability in the United States. 22 C.F.R. § 125.01 (footnote omitted).

Technical data are exported, according to regulation,

> whenever technical data is [sic] inter alia, mailed or shipped outside the United States, carried by

3/ The regulation appears to grant a general license for all types of academic instruction. However, the Office of General Counsel at the Commerce Department has informed this Office orally that it distinguishes between classroom instruction and specialized research. In its opinion ordinary classroom instruction would be covered by the general export license provided in the regulations even though discussion of industrial processes might be involved, whereas specialized research would require a specific license. The basis for distinguishing between the two types of instruction appears to be the reasonable belief that prohibited transfers of technology are much more likely to take place during the course of advanced research at the graduate level than in an undergraduate classroom.

> hand outside the United States, disclosed through visits abroad by American citizens (including participation in briefings and symposia), and disclosed to foreign nationals[*] in the United States (including plant visits and participation in briefings and symposia).
>
> */The term "foreign nationals" as used in this subchapter means "All persons not citizens of, nor nationals of, nor immigrant aliens to, the United States" as defined in the Department of Defense Industrial Security Manual. However, certain other foreign persons may be cleared to have access to technical data. See section 3 of the Industrial Security Manual. (Emphasis added.) 22 C.F.R. § 125.03.

Although academic settings are not specifically mentioned in these regulations, as opposed to the Export Administration Act regulations, the Arms Export Control Act has been interpreted to apply to any person, and not only those persons engaged in the business of manufacturing or exporting arms and ammunitions. Samora v. U.S., 406 F.2d 1095 (5th Cir. 1969).

Arms Export Control Act regulations further require that a license be obtained before technical data can be exported except when one of the exemptions in the regulations applies, e.g., they are already in the public domain in the form of a publication previously approved by the government. 22 C.F.R. §§ 125.04(a), 125.11(a), (b).

In order to enforce this Act, Congress granted the Executive branch the same enforcement authority found in the Export Administration Act, including the powers to investigate and to issue subpoenas. 22 U.S.C. § 2278(e). Thus, federal officials could also use the subpoena power under the Arms Export Control Act to compel UCSD to provide information about its foreign students if the government believes information may be or is being disclosed to those students in violation of the Act.

III.

While the Export Acts empower the government to compel the production of information needed to enforce those laws, it may be necessary to request that information by administrative subpoena rather than by letter. If UCSD receives funds directly from the federal government, or from students who are beneficiaries of federal educational grant programs, such funding may be withheld from UCSD if it discloses "educational records" in violation of the Family Educational Rights and Privacy Act of 1974. 20 U.S.C. § 1232g. The Act's dual purpose is to ensure parental access to student records and to protect

the privacy of student records by withholding federal funding from educational institutions that have a policy or practice of releasing "educational records," except under certain circumstances. Our analysis of the Act and its legislative history shows that it applies to the disclosure of information to federal employees investigating violations of the export control laws.

"Educational records" are defined by the Act to mean information that personally identifies a student, except for "directory information." § 1232g(b)(1). Each educational institution is directed by the Act and its regulations to establish a policy for the nondisclosure of personally identifying information that includes the designation of categories of personally identifying information that will be exempt from nondisclosure as directory information. § 1232g(a)(5); 45 C.F.R. § 99.5(a)(3)(ii).

UCSD has designated the following as directory information: a student's name, address, telephone number, departmental affiliation, major field of study, dates of attendance, and degrees and awards received. In addition, a student may request that even this directory information remain confidential. UCSD Memo, at 1. Thus, any information requested by federal agencies from UCSD that includes information directly related to a student, other than directory information that a student has not requested be kept confidential, is protected from disclosure by the Act. Inquiring agencies should consult each institution's nondisclosure policy to determine whether information sufficient to answer the agency's queries is disclosed as "directory information" pursuant to that institution's policy or whether the agency must issue a subpoena to obtain the information it needs.

Several exceptions to this prohibition are provided in the Act, only one of which applies to the situation at hand. An institution may release educational records if

> such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency. 20 U.S.C. § 1232g(b)(2)(B).

Once a student has attained eighteen or is attending a post-secondary institution, that institution need only notify the student under this provision. § 1232g(d). It is the duty of the institution releasing the requested information to provide the necessary notification before complying with a subpoena. Mattie T. v. Johnston, 74 F.R.D. 498 (D.C. Miss. 1976). Notice may be effected by publication or other reasonable method. Id.

The language of this exception permits disclosure under "judicial order, or pursuant to any lawfully issued subpoena . . ." An administrative subpoena issued in the course of federal enforcement of the Export Administration Act or the Arms Export Control Act would be a "lawfully issued subpoena" for purposes of this Act as courts accord wide latitude to administrative subpoenas issued by agencies acting under Congressional mandate. Courts will enforce a subpoena issued for a "lawfully authorized purpose" that "seeks information relevant to the agency's inquiry," U.S. v. Southwestern National Bank, 598 F.2d 600 (Em. App. 1979); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), and that imposes no undue burden, Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946). However, since the regulations sought to be enforced in this case raise First Amendment questions (see note 1 above) we recommend that any subpoena issued pursuant to those regulations be drafted with particularity to avoid or survive constitutional challenge.4/

An additional exception is provided for the release of personally identifying information to certain federal officials in the course of an evaluation of federally-funded educational programs. 20 U.S.C. § 1232g(b)(3). This exception would not apply here, however, unless UCSD received federal funding under a condition that it provide government officials with information necessary to prevent prohibited technology transfers.

One court has held that information contained in educational records is not protected from disclosure if obtained from a source other than the records themselves. Frasca v. Andrews, 463 F.Supp. 1043 (E.D.N.Y. 1979), found that a school newspaper had not violated the Act by publishing the fact of a student's suspension when this was likely to be known throughout the school community or through personal contact or conversation. Id. at 1050. Thus, it may not be a violation of the Act to gather necessary information by, for example, interviewing a foreign student's professors. This approach is not likely to be productive with respect to UCSD, however, since its policy specifically requires faculty members to refer all federal inquiries concerning export control matters to the Dean of Students. UCSD Memo, at 2.

4/ Independent of the UCSD problem, it should be noted that the effect of this Act is to expose any institution that discloses documentary information to enforcement officials regarding the programs or access of foreign students in attendance there to loss of federal funding in the absence of a subpoena and the requisite notice. Of course, each institution is responsible for determining which government requests for information must be accompanied by a subpoena in order to comply with the Family Educational Rights and Privacy Act.

IV.

A third statutory basis for acquiring information about foreign students' research activities is the Immigration and Nationality Act of 1952. While it appears that the export control laws can be used to acquire information about foreign students prior to their arrival in the United States, the Immigration Act applies directly to the entry situation.

Two types of student visas are provided by the Act. Students who seek to pursue a full course of study at an institution approved by the Attorney General are eligible for visas under subsection (F) of 8 U.S.C. § 1101(a)(15). Foreign students, scholars and specialists who wish to participate in Exchange Visitor Programs designated as such by the Secretary of State are eligible for visas under subsection (J) of that same provision. In either case, in order to receive a student visa, an applicant must not fall within one of the categories of excludable aliens under 8 U.S.C. § 1182(a).

One of the categories of aliens excludable under section 1182(a) are those aliens who, inter alia, are affiliated with "the Communist or other totalitarian party . . . of any foreign state . . ." 8 U.S.C. § 1182(a)(28)(C)(iv). The Attorney General may waive this exclusion upon a favorable recommendation by the State Department. § 1182(d)(3). Further, the Attorney General may prescribe conditions "to control and regulate the admission and return" of aliens who have been granted waivers. § 1182(d)(6).

Conceivably, this section would permit the imposition of a reporting requirement upon the student and/or the university both before and during the student's tenure in the United States as a condition of the waiver. Other section 1182(a) exclusions may also apply, depending upon the individual visa applicant, which would necessitate a waiver and afford the opportunity to impose a requirement.5/ The Executive has considerable power over the admission of aliens and "may impose any conditions on entry of aliens that [it] may deem appropriate." Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980), cert. den. 450 U.S. 959 (1981).

The Act further requires certain specialized information from foreign student visa applicants and the universities they plan to attend. Students applying for subsection (F) visas must be "bona fide students qualified to pursue a full course of study" at an institution that has been approved by the Attorney

5/ All the categories of exclusion under section 1182(a) are waivable by the Attorney General except subparagraphs (27), (29) and (33). These concern aliens who would endanger the security of the United States, engage in espionage or who were connected with the former Nazi government of Germany, respectively.

General for the admission of foreign students. 8 U.S.C. § 1101 (a)(15)(F)(i). In order to render a decision under this section, the Immigration and Naturalization Service (INS) would have to receive information from the student or the student's intended academic institution about that student's academic background and proposed study or research activities. Currently, INS subsection (F) visa forms require only: (1) that the university "retain all information which shows the scholastic ability . . . on which admission was based "as long as the student is in attendance there; and (2) that the student waive his or her right to privacy with respect to information needed to determine lawful non-immigrant status. Although it may be possible to derive sufficient course of study information from existing forms, it would probably be necessary to modify the forms to elicit specific course of study information.

In addition, an institution wishing to admit foreign students must petition the INS and set forth information to the effect that it is a duly licensed educational institution with sufficient facilities to conduct recognized courses. 8 C.F.R. § 214.3(e). Once it receives approval, the institution then certifies that the student will undertake a full course of study, as defined by regulation. 8 C.F.R. § 214.2(f)(1),(1a). Attorney General (INS) approval to admit foreign students with subsection (F) visas may be withdrawn for any reason, subject to appeal. 8 C.F.R. § 214.4(a),(j).

Under similar regulations promulgated by the Department of State, foreign scholars applying for subsection (J) visas must be accepted by an Exchange Visitor Program designated as such by the U.S. Information Agency (USIA).6/ 22 C.F.R. § 41.65. In determining a program's eligibility for Exchange Visitor Program status, USIA may require such documentary evidence from the program's sponsor as it deems necessary. 22 C.F.R. § 514.15(a). In addition, the program's sponsor must certify that "the activity in which the exchange visitor will engage is authorized under the terms of the official description of the program." 22 C.F.R. § 514.14(d). Exchange Visitor Program designation can be revoked if the program's sponsor fails to comply with the regulations. 22 C.F.R. § 514.17.

The Family Educational Rights and Privacy Act does not apply to gathering information about a foreign student from an academic institution prior to attendance there by that student. The Act defines the term "student" to exclude "a person who has not been in attendance at such agency or institution." 20 U.S.C. § 1232g(b)(6). Further, the Act's regulations also exclude from the term "student" for purposes of acquiring information from a new component, persons who may be attending one component (college or school) of a university who apply for admission to another component of the same university.

6/ USIA's name was changed from the "International Communication Agency" on August 24, 1982 by the Foreign Missions Act, P.L. 97-241.

Thus, under the Immigration Act, the government would be able to obtain information from universities about prospective foreign students by request rather than subpoena. Until a foreign student is granted a visa under the Immigration Act, and until a university obtains Attorney General approval to admit foreign students, those students cannot be admitted to or attend an academic institution and the Family Educational Rights and Privacy Act would not apply. Similarly, the government could obtain information by request to a component of a university to which a foreign student currently attending the university has applied, but has not yet been accepted.

Mary C. Lawton

MARY C. LAWTON
Counsel for Intelligence Policy
Office of Intelligence Policy and Review